

The Committee on Energy and Commerce
Internal Memorandum



July 12, 2011

TO: Members, Subcommittee on Oversight and Investigation

FROM: Subcommittee on Oversight and Investigations Staff

RE: Business Meeting to Authorize the Issuance of a Subpoena to the Office of Management and Budget in the Solyndra Investigation

On Thursday, July 14, 2011, at 12:00 p.m. in room 2322 of the Rayburn House Office Building, the Subcommittee on Oversight and Investigations will hold a business meeting to consider a resolution authorizing the issuance of a subpoena to the Office of Management and Budget (OMB) for documents relating to the \$535 million loan guarantee issued to Solyndra, Inc., by the Department of Energy (DOE).

I. DISCUSSION

A. The Committee's Investigation of the DOE Loan Guarantee Issued to Solyndra

The Energy Policy Act of 2005 authorized the Secretary of the Department of Energy to make loan guarantees to companies investing in either innovative clean technologies or commercial-scale renewable energy projects. In 2009, the American Reinvestment and Recovery Act (ARRA) appropriated funding to pay for the credit subsidy costs of the DOE loan guarantees for certain renewable energy, electric transmission, and leading edge biofuels systems. Because the stimulus provided funding for the credit subsidy costs, DOE has announced 20 conditional commitments for loan guarantees, and 11 of these guarantees have now closed.

Under the Financial Credit Reform Act (FCRA) of 1990, OMB is responsible for determining and approving the subsidy estimates associated with these loan guarantees. The credit subsidy cost represents the cost of the loan to the taxpayer if the recipient of the guarantee defaults on the loan. The Credit Subsidy Cost reflects several factors, including the cash flows of the loan recipient, the rate of recovery the government expects from the assets pledged as security for the loan, and the risk of default. In practice, the agency issuing the loan will use a model to determine the credit subsidy cost, and OMB then reviews and approves the cost calculated by the agency.

During late 2010 and early 2011, several news articles described financial problems experienced by Solyndra, Inc., a California company and the first recipient of a DOE loan guarantee of \$535 million. Based on these articles, and the fact that this Committee previously had not conducted any oversight of the Loan Guarantee Program, on February 17, 2011, the Committee opened an investigation of the program and the guarantee issued to Solyndra with a letter to DOE Secretary Chu requesting a briefing and certain documents relating to the Solyndra loan guarantee.

Following a briefing with DOE staff, the Committee then sent a letter to OMB Director Jacob Lew on March 14, 2011, requesting a briefing and certain documents in order to learn more about OMB's role with regard to DOE loan guarantees generally, and especially with regard to Solyndra. That letter requested a briefing and the following categories of documents:

1. All documents in possession of the Office of Management and Budget relating to the \$535 million loan guarantee for Solyndra and the loan guarantee's Credit Subsidy Cost, including, but not limited to, notes, analyses, reports, memoranda, and all drafts of such documents.
2. All documents containing communications between and among the Office of Management and Budget officials, staff, administrators, and employees relating to the \$535 million loan guarantee for Solyndra including, but not limited to, letters and email.

B. OMB's Response to the Committee's March 14 Document Request

The Hearing Memorandum dated June 22, 2011, for the Subcommittee on Oversight and Investigations June 24, 2011, hearing entitled "OMB's Role in the DOE Loan Guarantee Process" and a Supplemental Memorandum issued on June 23, 2011, by Majority Committee staff describe OMB's incomplete response to the Committee's document requests. *See* Attachments A and B.

Following OMB's failure to fulfill an agreement with Committee staff regarding the production of certain OMB communications, the Committee subsequently invited OMB Deputy Director Jeffrey Zients to testify at the June 24, 2011, hearing to explain OMB's refusal. Deputy Director Zients informed the Committee that he would not attend and requested an alternate date. Committee staff informed Deputy Director Zients that the hearing would not be rescheduled, and asked him to attend and testify about OMB's role in the DOE loan guarantee process and its failure to produce documents to the Committee. Deputy Director Zients did not appear at the June 24, 2011 hearing.

Majority staff then discussed with Minority staff the four categories of OMB documents that the Committee needs to review as part of its investigation of the DOE loan guarantee to Solyndra. In short, those documents are:

1. All documents created or drafted by OMB (including reports and memos) relating to the Solyndra guarantee.

2. All communications between DOE and OMB relating to the Solyndra guarantee.
3. All communications among OMB personnel relating to the Solyndra guarantee (or, internal emails).
4. All communications between OMB and the White House relating to the Solyndra guarantee.

After Minority staff's discussion with OMB, OMB stated that it was only willing to provide an *in camera* production of the documents in Category 2 above — communications between OMB and DOE and OMB. Minority staff reiterated that OMB's position remained that OMB was not willing to produce any internal documents (either emails or memos).

The *in camera* review of these documents was conducted on July 11, 2011. Committee staff reviewed, but was not allowed to take possession of, communications exchanged between OMB and DOE relating to Solyndra from 2008 through the loan's closing date on September 2, 2009. Key information relating to the risk ratings assigned by DOE and OMB to the Solyndra deal were redacted from these documents; OMB has continued to refuse to produce this information throughout the investigation, even in *in camera* form. In addition, OMB has not produced communications between OMB and DOE following the loan closing, from September 2009 through 2010, during the period of the loan modification. OMB staff stated that they are now pulling and reviewing these documents, although the Committee requested them four months ago. The July 11 *in camera* review did not include any internal OMB communications or internal OMB documents related to Solyndra, nor did it include (with the exception of one email) any communications between OMB and the White House relating to Solyndra. OMB has stated repeatedly during the past several months that, in OMB's judgment, the Committee does not need to see the emails between OMB and DOE.

II. THE RESOLUTION

As described in Attachments A and B to this memorandum, Committee staff has worked extensively for almost four months with OMB staff to obtain documents relating to the Solyndra review. While the documents OMB has provided to the Committee, either through production or *in camera* review, show some of the information DOE provided to OMB and certain questions or issues discussed by the agencies, they do not show what actions OMB took as it reviewed and analyzed that information, and what OMB's ultimate conclusions were. This information is relevant in determining the scope and strength of OMB's review and whether OMB properly carried out its duties and responsibilities under the FCRA.

OMB has not invoked a valid privilege for withholding these documents from the Committee. Due to the repeated delays and noncompliance, Committee staff does not believe that further negotiations with OMB will result in the timely production of these documents to the Committee, if at all.

For these reasons, the proposed resolution will authorize Chairman Upton to issue a subpoena to OMB for production of documents relating to the Solyndra guarantee.

III. CONTACTS

If you have any questions, please contact Todd Harrison or Karen Christian at (202) 225-2927.